UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 01-1139 (JKF)
	.	
W.R. GRACE & CO., et al.,	.	
	.	824 North Market Street
	.	Wilmington, DE 19801
Debtors.	.	
	.	September 2, 2008
. . . . .		9:12 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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THE COURT: All right. This is the matter of W.R. Grace, 01-1139. There is a specially set hearing at nine o'clock on the motion of Mian Realty for entry of an order declaring that the automatic stay does not apply to a filing of its proposed third party complaint against the debtor concerning an environmental issue. I think the list I have at the moment is the accurate one for phone participation for this hearing. That would be John Phillips, Jennifer Whitener, Janet Baer, Laura Hammond, Robert Horkovich, Robert Sidman, Debra Felder, Shayne Spencer, Dale Cockrell, Arlene Krieger, Theodore Freedman. That's all. And I'll take -- I can't type today. I'm sorry. I'll take entries in Court. Thank you.

MS. BAER: Good morning, Your Honor. Janet Baer on behalf of the debtor.

MS. MAKOWSKI: Good morning, Your Honor. Kathleen Makowski from Pachulski, Stang, on behalf of the debtors.

MS. MARKS: Good morning, Your Honor. Pamela Marks from the law firm of Beveridge & Diamond on behalf of the debtors.

MR. REILLEY: Good morning, Your Honor. Patrick Reilley from Cole Schotz on behalf of Mian Realty.

MR. KARWOWSKI: Good morning, Your Honor. Henry Karwowski of Trenk DiPasquale, appearing on behalf of Mian Realty.

THE COURT: Sir, I'm sorry, but I can't hear you.

MR. KARWOWSKI: I apologize. Your Honor. Henry Karwowski, K-a-r-w-o-w-s-k-i, of Trenk DiPasquale, appearing on behalf of Mian Realty, LLC.

THE COURT: Thank you.

MR. KARWOWSKI: Thank you.

MR. TACCONELLI: Good morning, Your Honor. Theodore Tacconelli for the property damage committee.

MR. HURFORD: Good morning. Mark Hurford, Campbell & Levine, for the ACC.

THE COURT: Who is arguing on behalf of Mian Realty? Mr. Karwowski? Yes, sir. Good morning.

MR. KARWOWSKI: Good morning, Your Honor. Just reviewing procedurally, Mian Realty filed a motion back in April. The debtors filed opposition in May, and with their opposition they filed a request to conduct supplementary discovery. The parties consensually agreed to exchange discovery. You may recall that the parties were back here on July 21st, at which point the Court scheduled a briefing schedule. And subsequent to July 21, the parties filed -- well, the debtors filed a supplemental response and Mian Realty filed a reply. And it’s my fault, I think there was some -- I’m not a regular practitioner in Delaware, Your Honor, so I was not aware that replies are limited to five pages, so maybe in my argument today going outside the scope of what’s in our papers because we just couldn’t address all the points in five

pages.

THE COURT: All right. It's significantly longer than five pages. It's more like half a ream of paper with all of the attachments. But, okay.

MR. KARWOWSKI: Okay. Thank you, Your Honor. The motion is, as you mentioned, for an order declaring that the automatic stay does not apply to this proposed third party complaint. Essentially the issue comes down to when did the claims accrue? When did Mian's claims accrue? Mian is arguing that Frenville applies. The debtors argue essentially that a legal relationship test applies. That's essentially what the conflict comes down to.

There are a number of reasons as to why Frenville should apply. One is it was a case addressing a similar fact situation, which was whether or not the automatic stay applied, whether -- as opposed to the cases cited by the debtors. Most refer to whether claims were discharged. So, factually which is more apposite? Is it Frenville or the relationship cases? It's Frenville. And as we know, Frenville mentions that -- or holds that a claim does not accrue until there's a right to payment.

The second reason why Frenville should apply is it addressed contractual contingent claims, meaning where the parties are aware, upon entering their relationship, the liability relies upon the occurrence or triggering of some

event. It involves a bargained for contractual relationship, such as a guarantee or surety, where liability again depends on some identifiable future event. Here we're not talking about contractual liability, we're talking about environmental tort. So, the concepts regarding contractual liability would not apply here. So, in looking in Frenville, is there any mention of the expression legal relationship? There is not. There is only right to payment. That is a governed standard. And in fact, subsequent to Frenville, Courts applying Frenville have required a right to payment. Those cases, or examples of those cases are the Allegheny case cited in our papers, also the Hillsborough (phonetic) case.

The next question, why is the mere existence of a legal relationship insufficient for determining whether or not there's a claim? One is, again, it's inconsistent with the Frenville standard. There must be a right to payment. Second is it would lead to absurd results. In the Schweitzer case cited by the debtors there's a reference to the need to avoid absurd results. I believe that case involved asbestos victims who had not manifested injury yet as of the petition filings, and the Court found that it would be absurd that these parties could possibly know that they had a claim as of the petition date.

It also raises -- I'm sorry -- the third reason as to why the legal relationship test should not apply is it raises

difficult issues of due process. Again, Schweitzer, the Third Circuit noted that the asbestos victims who had not had an injury yet did not receive notice of the petition filings, and here we should note, Your Honor, did Mian Realty receive notice of the petition filings, actual notice from the debtors? It did not, signifying that there was not a relationship sufficient for determining whether or not there was a claim.

THE COURT: Well, why would Mian get notice of the actual notice when Mian didn't have a relationship with the debtor for I don't remember how many, but something like, if I recall correctly, 17 years before the filing? I mean, wasn't the building sold to Mian, or the land sold to Mian back in the 1980s?

MR. KARWOWSKI: That's correct, Your Honor.

THE COURT: So, why would Mian -- why would the debtor ever assume, if Mian hadn't raised an issue with the debtor in 17 years that there was some actual notice requirement for the debtor to give Mian actual notice of its bankruptcy filing when Mian hadn't lodged any allegations against the debtor in 17 years? And I'm saying 17, correct me if I'm wrong about the number, but it was a substantial period of time.

MR. KARWOWSKI: Well, that only supports the proposition, Your Honor, that there was no legal relationship, because if there was presumably there would have been notice.

THE COURT: Well, there was a legal relationship at a point in time, but there clearly -- at the point in time at which the bankruptcy filing arose, the debtor couldn't possibly have known that Mian was asserting that there was a legal relationship. It's sufficient to give actual notice, because Mian hadn't lodged any claims against the debtor. And in fact, you're arguing even yet that Mian had only a contingent claim which would have been unknown as to the debtor as of the date of the filing of the bankruptcy.

MR. KARWOWSKI: Yes, Your Honor. As of the filing he had no idea he had a claim. That is correct.

THE COURT: Okay. So, if he didn't know, how would the debtor know?

MR. KARWOWSKI: Well --

THE COURT: So, the debtor couldn't possibly give actual notice of the bankruptcy.

MR. KARWOWSKI: Well, it's just implicating that the -- the importance of due process, and it's something that the Schewitzer Court mentioned as a factor.

THE COURT: But you can't give somebody due process when they don't even know they have a claim. I mean, the purpose for the debtor advertising and publicizing the fact that it is in bankruptcy and advertising notice of a bar date is just that, to drive from the woodwork those entities that think they have a claim or that suspect they have a claim that

the debtor doesn't know. Mian falls into that exact category. As of the date of the filing of the bankruptcy the debtor couldn't possibly know that Mian doesn't know that it has a claim.

MR. KARWOWSKI: I think all of this supports our position, Your Honor, because their position is -- for there to be a contingent claim there must be awareness, and at that point of time there was no awareness by anybody. So, it --

THE COURT: But there was awareness by Mian because Mian had had all --

MR. KARWOWSKI: That --

THE COURT: -- this other stuff going on on the property. The debtor couldn't know because it didn't own the property anymore.

MR. KARWOWSKI: I --

THE COURT: Mian clearly knew that there was something going on on the property.

MR. KARWOWSKI: Your Honor, I will explain in a few minutes why there was no reason for him to suspect anything.

THE COURT: Okay. Well, I don't -- all right. I don't understand that. If he had wells driven, and had environmental studies going on, and other things going on on the property, there was clearly reason for Mian Realty to suspect something.

MR. KARWOWSKI: Well --

THE COURT: Otherwise why do all the things that he was doing?

MR. KARWOWSKI: Well, he wasn't doing anything, Your Honor. It was the neighbor who had contamination on his own property, suspecting that perhaps it was coming from Mian's property. Mian himself never drilled a well, ever.

THE COURT: Okay.

MR. KARWOWSKI: And as far as he was told, there was contamination on his neighbor's property, and pursuant to New Jersey law they were merely investigating the full extent of contamination. And so, as far as he knew all there was was contamination on the neighbor's property. And no one ever came to tell him, oh, by the way, there's contamination on your property. That never happened until '06, 2006.

THE COURT: All right.

MR. KARWOWSKI: Next, Your Honor, another reason why the standard advocated by the debtor should not apply is because it's actually more broad than the standard used by the circuits. And we're all aware of how much Frenville has been criticized in virtually every other circuit as being too narrow of a standard. So, how is it possible now that a mere contractual relationship or the mere existence of a statute is sufficient when under other circuits' law that would not be sufficient?

THE COURT: I'm sorry. I didn't follow what -- I

just didn't follow what you said. Would you restate?

MR. KARWOWSKI: Of course, Your Honor. Other circuits, in determining whether or not there's a claim, appear to require that the claimant have at least some notice or knowledge, and according to the -- in order to have a claim, as opposed to Frenville, which requires right to payment. These other circuits have a more liberal standard. They say, well, you know what? To have a contingent claim all you need to have is some notice or knowledge that you have a claim. And what I'm saying is the debtors are actually making that more broad to say, you know what? A mere contractual relationship, or the mere existence of an applicable statute, such as CERCLA, is enough, when under the other circuits that would not be enough, you still need knowledge or awareness. And the debtors are saying, well, a mere contractual relationship is enough, a mere statute is enough. No, it's not, not even according to the circuits. So, what I'm saying is the debtor's standard is actually more broad than any test ever applied by any other Court.

THE COURT: Okay. So, you're looking at Frenville as a restrictive standard because you not only need to know -- have notice of your claim, but you also have to have -- liquidated isn't quite the right word, but had it fixed to the point where you have a right to payment?

MR. KARWOWSKI: That's correct, Your Honor.

THE COURT: Okay.

MR. KARWOWSKI: That is what Frenville says. And that is the way it has been applied. You know, I would refer to the -- I may be mispronouncing it, but the Alle -- A-l-l-e-g-h-e-n-y case.

THE COURT: Allegheny.

MR. KARWOWSKI: Exactly. That's the District Court matter that was actually affirmed by the Third Circuit, and they applied the Frenville test in the CERCLA context. And they required right to payment.

Next, let's get to the contractual relationship and the statutory relationship, whether or not that's sufficient. The debtors cite the Paoli case, the Paoli Yard case. Even in that case, Your Honor, if we look at the case, it requires that the legal relationship be relevant to the claim, that the legal relationship be relevant to the claim and that the claim flow from that relationship, i.e., flow from the contract. So, a mere legal relationship is not sufficient. That is what the Bessemer Court said. Bessemer, that's the Third Circuit case, '95, the Penn Central case. They said a mere legal relationship is not enough. There has to be some connection between the claim and the relationship. And here is Mian asserting contractual claims, breach of contract? No. It's asserting environmental tort claims. So, even under their test, even assuming a contractual relationship is sufficient,

it doesn't apply here because we're talking about environmental claims, not contractual claims.

THE COURT: But Mian's only method of having that claim is based on the contract. It purchased the property. If it hadn't purchased the property pursuant to the contract it wouldn't be in the chain of title to give it any environmental claim whatsoever.

MR. KARWOWSKI: Yes, but what is the governing law, Your Honor? It's not contract law. It's CERCLA. It's environmental law. That's what's relevant here. So, that's as to the contractual issue.

As to the statutory relationship, a mere statutory relationship is insufficient. Why? Because if we look at the Schweitzer case, I believe it was a FELA matter, F-E-E -- I apologize, F-E-L-A, some federal law. And the Court still assessed whether or not there was a manifestation of injury. It still looked to whether or not there was a claim under FELA. It wasn't enough that the FELA existed. There had to be something more. So therefore, the mere existence of a statutory relationship is not enough. There has to be some claim, continued claim under the statute.

THE COURT: Well, that's a personal injury claim. So, yes, you do have to have some manifestation. You have to know you were injured.

MR. KARWOWSKI: Yes.

THE COURT: That's a bit different from an environmental injury, isn't it?

MR. KARWOWSKI: But it's the same because the debtors are saying the mere existence of the statute was enough. The fact that CERCLA existed in '86 was enough to create a statutory relationship, and I'm saying that's not enough. There's got to be something more. Otherwise, think about it, think about how broad --

THE COURT: Well, I don't think the fact that the statute exists gives you a claim.

MR. KARWOWSKI: That is what they're saying, Your Honor.

THE COURT: Well --

MR. KARWOWSKI: And Mian is saying that we disagree.

THE COURT: Okay.

MR. KARWOWSKI: Next is policy. Why should the Court apply Frenville and not the legal relationship test? There are a number of reasons, Your Honor. What are CERCLA's goals? Number one, facilitate expeditious clean up and protect the public health. Number two, produce a large group of potentially responsible persons who can pay for the environmental damage, produce settlements among the parties.

THE COURT: Yes, but who has that right to do all that? The issue, I think, is not what CERCLA is intended to do. The issue is, I think, who has the right to enforce the

CERCLA provisions? And I think what the debtor is saying is that the governmental entities have the right to enforce those claims, and in fact do enforce those claims, and in this instance have enforced those claims. So, where is the private right of action?

MR. KARWOWSKI: Well, under New Jersey law, Your Honor, a private actor has standing. And I believe we cite law in our brief for that proposition. And not only that, but that point the debtor has made is limited to the injunction point. They don't make that point as to the other claims.

THE COURT: But that's the point. As to the injunction claim that, to a certain extent, assuming that you can't convert the injunction into a damage claim, assuming that you can't, then maybe there is some basis to say that the provisions of the discharge injunction that protect the debtor because of -- and the automatic stay if the plan hasn't yet been confirmed, which of course in this case it hasn't, shouldn't apply. But to the extent that the claim, including the injunction, can be turned into a monetary damage claim, then why isn't Mian in the same position as every other claimant in the case, i.e., subject to the automatic stay to the extent that the debtor, at some point, has to deal with these claims. The debtor will have to deal with them through the plan, which hasn't yet been confirmed. Why does Mian get a free pass beyond the automatic stay when no other creditor has?

MR. KARWOWSKI: Well, because, Your Honor, those other parties had claims as of the petition date.

THE COURT: So did Mian. If Mian has the right to payment, i.e., a damage claim, against the debtor, then so does Mian. It should be filing a claim.

MR. KARWOWSKI: Yes, Your Honor --

THE COURT: And if it didn't, then it's too late.

MR. KARWOWSKI: You are correct, Your Honor, except the key word is assuming. And Mian is saying there was not a continued claim as of -- not only do you not need a contingent claim, number one, number two, even if there was it didn't exist in this case.

THE COURT: But the definition of claim in the Bankruptcy Code includes contingent claim. There's no way around that.

MR. KARWOWSKI: But that's not the way the Third Circuit interprets it.

THE COURT: But it is the way the Third Circuit interprets it. What the Third Circuit has interpreted differently is in the automatic stay context when the -- when a person may be able to get around the provision of the automatic stay in a breach of contact suit for an instance that came up in Frenville, which, don't forget, was an accounting matter, not an environmental claim at all. So, the issue in Frenville was very narrow, not the broad type of relief that we're

looking at now, and is much different from talking about a plan that hasn't yet been confirmed, and whether or not a debtor ought to be dealing with what may be a pre-petition claim through the course of its Chapter 11. Mian is essentially saying we ought to be taken out of this case and allowed to go into State Court and sue the debtor, unlike any other creditor in the case. Now, why? Why should Mian get that opportunity when no other creditor in the case has? I can assure you there have been innumerable creditors who have attempted this type of action in this case, and I know, because I've been here for almost all of them, probably not all but almost all of them, and so far they haven't succeeded. Why should Mian?

MR. KARWOWSKI: Because, Your Honor, those -- I think I looked at the docket, and I -- I did look at the docket, and if I'm not mistaken those parties were seeking relief from the stay, as opposed to arguing that the automatic stay does not apply.

THE COURT: It doesn't matter.

MR. KARWOWSKI: I don't think I've seen a single motion like this in this case.

THE COURT: Well, I'm not sure whether one particular creditor wasn't actually seeking a declaration that the automatic stay didn't apply, but my recollection may be in error, because it's been a long case, so I'm not sure about that. But regardless, it doesn't matter whether you get it

through the front door or the back door. What you're basically doing is trying to get out of the provision of the automatic stay and into State Court. Now, why should Mian get that opportunity when this debtor hasn't yet confirmed the plan? It's in the process of dealing with its liabilities. And to the extent that Mian has a claim, why shouldn't Mian be in the same position as every other creditor. If, in fact, your client had a contingent claim, if it did, then it should be here. If it had no claim pre-petition, then we ought to be talking about when the claim arose because I'm not quite sure how, if it -- if the relationship between your client and the debtor arose back in the '80's and the debtor's responsibility for the environmental problem had to have accrued when the debtor owned the property, which was back in the '80s, then the debtor's responsibility for that environmental damage had to have accrued back in the '80s because it hasn't owned the property since. So, any way you look at it, no matter how I slice it the debtor, to the extent the debtor is liable at all, its liability is back in the '80s.

Now, your client's relationship with the debtor began and ended back in the '80s. It hasn't had any contact with the debtor since then. So, to the extent that the debtor is responsible for some damage that your client has suffered, its liability was fixed back in the '80s. So, how does your client not have a claim against the debtors that arose back in the

'80s?

MR. KARWOWSKI: Because we don't look -- Your Honor, because we don't look at whether a claim arose when the act occurred. We look at it in -- in the Third Circuit as to when right to a payment arose. And even if we apply the --

THE COURT: On a breach of contract, but this isn't, as you've just said, a breach of contract claim.

MR. KARWOWSKI: But there's nothing in Frenville that limits it to breach of contract.

THE COURT: Well, there's a footnote in Frenville that says in mass tort context it may not apply, so if it may not apply in mass tort context why may not it apply in environmental context either?

MR. KARWOWSKI: Well, I'm not sure that it says the, when you say it, I'm not that that is the --

THE COURT: Well, look at the footnote. I don't have the case here.

MR. KARWOWSKI: But, Your Honor, even assuming we apply the debtor's tests, again, those tests require some awareness or knowledge. Mian had no idea, back in 2001, that he had a claim.

THE COURT: Neither do asbestos creditors at the time that they've suffered their injury. That's probably why the footnote in Frenville says that it may not apply in mass tort cases.

MR. KARWOWSKI: But Schweitzer is an asbestos case, and the Court said you know what, if you didn't know, then you didn't have a claim, if there was no manifestation of injury. And that's the same thing that we have here, Your Honor. And I'll get to the reasons why he didn't know. But I also -- I wanted to briefly mention why CERCLA -- there are certain policies, and why, if we apply the debtor's test, it would create bad incentives. For example, assuming the debtor's test applies, what would stop a debtor, like Grace, from selling property, a month later saying, oh, by the way, there's an environmental hazard on your property --

THE COURT: Well, you're assuming --

MR. KARWOWSKI: -- and then filing?

THE COURT: But you're assuming that Grace knew that there was some environmental liability, too. And what you're just telling me is --

MR. KARWOWSKI: There's an exhibit -- Your Honor, there was an exhibit that shows they knew.

THE COURT: Well, okay. Then, if that's the case, then your client apparently didn't do the due diligence that it should have done when it purchased the property, so no matter how you look at it, its claim should have accrued back in the '80's when it purchased the property, and it may, in fact, have some breach of contract type claim against the debtor, but if your client didn't know about it until 2006 because it hadn't

manifested until that time, how would Grace have known about it until 2006 when it manifested?

MR. KARWOWSKI: Two things, Your Honor. One, it did know, and number two, the obligation is not on the buyer to look -- to search out for hazards. Under New Jersey law the obligation is on the buyer to disclose to the seller.

THE COURT: The seller is --

MR. KARWOWSKI: I'm sorry. From the seller to disclose to the buyer. Yes. The second reason why this test, the debtor's test would create bad incentives is it would limit the pool of potentially responsible parties, leaving some parties to shoulder the burden, and it would create a situation where the DEP claimants will spend more time trying to find out who is a potential party rather than cleaning up the property, which is what CERCLA is designed to do. It's first to clean up the property and then deal with liability later. That's what CERCLA says. You don't have a claim until response costs are incurred.

THE COURT: But that gets us back into the public versus private right of action issue again.

MR. KARWOWSKI: But, Your Honor, I don't think -- even the debtors don't argue that Mian has standing to assert these claims. They assert standing only as to the injunction claim, not as to the remaining nine claims, so I don't think there's an issue as to standing. And again, policy would be

furthered here especially because why? Because here this is a case where, I think it's Exhibit G in the debtor's exhibit book, it showed as a memo or letter in which the debtor is expressly saying or referring to an environmental damage. That's Exhibit G. This is the December 22nd, 1986 letter, Your Honor. And if I may quote from it? This is pre-sale, Your Honor. "It is also my understanding that Harry is looking into what, if any, environmental problems may have been caused with our property by the dumping that may have taken place on our neighbor's property." This is pre-sale, Your Honor.

THE COURT: Yes. And then it says, "It's my advice, as well as Nancy's, that we do not finalize an agreement until we're satisfied that we either know that no problems exist, or understand the extent of the problem if there is one."

MR. KARWOWSKI: Okay. Then --

THE COURT: So, obviously they didn't know at that point in time.

MR. KARWOWSKI: Okay. Then let's look to see what kind of research they did to find out. That's in Exhibit H. This is a January 7th, 1987 memo. And if we look at the first page, near the bottom, this is a few months -- this is a month before the sale. They say the completion date is difficult to estimate. That's completion, they were referring to cleaning up the environmental damage.

THE COURT: Well, it says at the beginning, "Recently

we discussed the possibility." I don't know to whom these memos are going. I don't know who these entities are, so --

MR. KARWOWSKI: Well, Baker & Taylor, Your Honor, is -- was owned by W.R. Grace.

THE COURT: "Recently we discussed the possibility of environmental problems at the neighboring warehouse affecting the property at 6 Kirby. Since our conversation I have spoken to Ed Putnam of the New Jersey Department of Environmental Protection, who was reluctant to give me information over the phone. He said that if we have specific questions requiring answers we should write to this person who is the chief bureau site operator," and so forth. Then, "I've also spoken to Bruce Wolf, the health officer for the Borough of Somerville, please see attached documentation which addresses our concerns. I believe this information is sufficient to clear up the issue."

MR. KARWOWSKI: Okay. Let's look at that memo, then, that he's referring to. That's the next -- that's two pages later, Your Honor.

THE COURT: Okay. "This is to bring you up to date on the clean up operations being conducted at the site."

MR. KARWOWSKI: And if we look in the third paragraph we see a reference to the need for regular air monitoring, a 24-hour guard and patrol. This is how extensive the damage is at this property.

THE COURT: But this is the neighboring property.

MR. KARWOWSKI: Yes.

THE COURT: Okay. So, you mean your client purchased this property with air control monitoring equipment set up there and didn't know that it was going on in the neighboring property?

MR. KARWOWSKI: I don't know, Your Honor.

THE COURT: Okay. So -- but he wasn't purchasing the neighboring property anyway, and Grace didn't own it?

MR. KARWOWSKI: But how was it -- why is it that Grace is so concerned that in their own memo they say, wow, this might implicate our own property?

THE COURT: Because --

MR. KARWOWSKI: There must have been some connection there.

THE COURT: Well, because they want to make sure that they've done due diligence, which they did.

MR. KARWOWSKI: Okay. but if we see later on -- we see the clean up -- in the next paragraph, "The clean up process has been hampered, and attempts to complete this project quickly have been frustrating."

THE COURT: Well --

MR. KARWOWSKI: The next paragraph, "Another issue which has affected the clean up at this and other sites is the lack of hazardous materials treatment and disposal facilities approved for use by NJ DEP."

THE COURT: Okay.

MR. KARWOWSKI: In the next paragraph, a reference to a fire, completely destroyed the complex adjacent to the warehouse. The next paragraph, in April of this year there was a spill. And then, in the next paragraph we see, well, you know what, 70 percent has been cleaned up.

THE COURT: Okay.

MR. KARWOWSKI: 30 percent had yet to be cleaned up.

THE COURT: And then it says --

MR. KARWOWSKI: And yet despite --

THE COURT: -- “We’re making every effort to complete the removal action by the end of the summer. After the removal action has been completed the warehouse and work area will be decontaminated, and sampling will be conducted in and around the building.”

MR. KARWOWSKI: End of summer meaning months after the sale occurs.

THE COURT: Well, I don’t know --

MR. KARWOWSKI: So, despite these --

THE COURT: -- when the sale occurs.

MR. KARWOWSKI: It was in February of ‘87, Your Honor.

THE COURT: All right. Then in August of -- August 20 of ‘86 there is a site visit note that says that 80 to 85 percent of the materials were removed, 90 percent of the liquid

waste were processed. The potential for anything else is minimal. All the solids have been bulk piled and are awaiting disposal, and completion is expected before October. So, it's clear that the New Jersey DEP did the clean up. So, at that point what damage is there to your client? And this is all in the neighboring property. So far we don't have anything that ties the neighboring property clean up or damage into your client's property.

MR. KARWOWSKI: Well, I would note, number one, Your Honor, as to number four, completion is not expected before October.

THE COURT: Right.

MR. KARWOWSKI: -- but it also says, the NJ DEP does not want to project actual dates due to possible unforeseen delays. We don't actually know when it actually completed the clean up.

THE COURT: Okay. But before October. This is dated August 20, so that's not a long time in the future.

MR. KARWOWSKI: Which is post sale. But it brings to mind an interesting paradox in that why is it that Mian was duty bound to look for things in the '90s, and look for a claim, when it had no -- when he had no idea that he had one? Or as here, this is sufficient? W.R. Grace knows that 30 percent of the clean up hasn't even occurred yet, and they --

THE COURT: But it's not on its property.

MR. KARWOWSKI: That's a reasonable response, Your Honor, but apparently it was enough to have in their own memo a concern about it.

THE COURT: Okay.

MR. KARWOWSKI: That there might have been some connection between the two properties.

THE COURT: And it did due diligence, and it's been told that the clean up is progressing apace, and that by October everything is going to be done, and that the property is going to be decontaminated. So --

MR. KARWOWSKI: But to disclose none of that in -- to the potential purchaser?

THE COURT: Well, I don't know what it disclosed and what it didn't disclose.

MR. KARWOWSKI: This was nothing, Your Honor, so --

THE COURT: Well, I don't know what it disclosed and what it didn't disclose.

MR. KARWOWSKI: There's nothing in the purchase agreement about that.

THE COURT: What does it have to disclose about a neighboring property? What obligation does Grace have to disclose something that's happening on a neighboring property?

MR. KARWOWSKI: In a usual situation, nothing. But apparently in this case, given the memo, there was something leading them to believe that --

THE COURT: That's an assumption. You've just criticized me for making an assumption about your client's claim, and quite frankly that's an assumption that because there's something happening on a neighboring property there's something happening on the property being sold.

MR. KARWOWSKI: But does that happen to properties being sold every day, that the buyer stands back and thinks, you know what, maybe I should check to see if there's environmental damage --

THE COURT: Frankly, in this day and age, I think yes, it does. Just about every day. Even neighboring properties in residential areas have blacktop driveways and people are looking to see whether that's causing environmental damage. Yes, it does happen, on a regular basis.

MR. KARWOWSKI: Okay. But I guess I make the point, Your Honor, that it just seems like W.R. Grace is making two different -- making inconsistent arguments. It's saying no, you should have known about your claim, and oh, by the way, back in '86, we didn't have an obligation to disclose.

THE COURT: There wasn't -- from what I can see in the documents on the property that the debtors sold, so far there isn't a connection to a hazard on the property that the debtor sold. So, if your client didn't know about a claim, and the debtor didn't know about a claim, so far I'm not seeing that perhaps there really was a claim. But if there was a

claim, then it arose back in the ‘80's. That’s the point, I think. To the extent there was a claim, it was unknown -- that’s not the right word -- to the extent that it was -- to the extent the claim existed but had not manifested back in the ‘80s, it arose nonetheless in the ‘80s. It gave rise to a claim for liability back in the ‘80s, even though the liability itself was not fixed and liquidated back at that time.

MR. KARWOWSKI: But, Your Honor, even the debtors are not arguing that. They’re not arguing that the claim was contingent in ‘86. They’re saying it -- the contingent claim accrued when Mian knew about it. Awareness, knowledge. It’s not when the act occurs. It’s when there’s awareness, knowledge.

THE COURT: Okay.

MR. KARWOWSKI: Even the debtors don’t make that argument about --

THE COURT: Well --

MR. KARWOWSKI: -- going back to ‘86.

THE COURT: Just because the debtors don’t make the argument either doesn’t mean I have to buy the debtor’s theory, either. I mean, I’m trying to look at the documents and figure out what it is that I have here, and whether or not the automatic stay does or doesn’t apply to this case. It seems to me that to the extent that these documents indicate that something happened back in the ‘80s that may have given rise to

a liability, there's a pre-petition claim to which the automatic stay applies. That's the only issue I have before me, whether the automatic stay applies such that if there is a liability the debtor ought to be dealing with it in its plan if the debtor is liable. That's what I'm looking at today. I'm not trying to figure out whether there is a claim, isn't a claim, who is right and wrong. I'm only trying to look at this from the perspective of the automatic stay. I'm not making any findings. I don't have any evidence before me to make findings. I've got these letters that say the debtor is looking at something, you're telling me they didn't disclose it. I'm trying to figure out whether back in the '80s is there enough that there could have been a claim, and if so, does the automatic stay cover it? That's all.

MR. KARWOWSKI: I understand, Your Honor, and I'm saying that even under their own test I'm saying it could -- not even they're saying it accrued in '86. They're saying it accrued much later.

Moving on, Your Honor. I've been referring to the cases cited by the debtors. Let's look very briefly at some of these cases and see if they're factually relevant to our matter. And the way the debtors describe their test is the fair contemplation test, whereas when you look at some of these cases, or actually all of them, there's more than just this could have been fairly contemplated. There's actual notice or

knowledge. For example, Crystal Oil, the claimant actually observed the waste and the claimant actually had information tying the debtor to the contaminated site. The Jensen (phonetic) case. There was a letter from the California Department of Health Services informing the claimant of, quote, serious environmental hazard at the site. The Chicago Milwaukee case. Claimant had clear knowledge of release of a hazardous substance. And finally, the National Gypsum case. That case actually supports Mian. Why? Because it says in determining whether there's claim accrual what do you look at? The knowledge of the claimant, the commencement of clean up, and the occurrence of response costs. This actually supports Mian, Your Honor.

So, if we look at some of these cases we notice that these cases require actual notice or knowledge. Do the debtors cite anything factually similar to this case where there's some documents indicating, well, you know what, Mian, we want to drill on your property, see if our contamination on our property has spread to your property? Is there anything like that? No, Your Honor. Those cases don't exist. So, we get to the question of could Mian have fairly contemplated that he had a claim? Even assuming this test applies, because again, I'm saying, Your Honor, Frenville applies, and it requires a right to payment. But even assuming we apply their test, Mian still wins.

Let's look at some of their exhibits. And these are the debtors' own exhibits, Your Honor. Som of them refer only to mere testing that will occur. These are Exhibits M, R, S and Q. They don't say Mian, there's contamination on your property. They say only we're going to conduct testing. Others fail to even refer to Mian's property. They refer to the outer area. So, it's impossible to determine whether or not it was referring to Mian's property. Those are Exhibits N, O and P.

THE COURT: I'm sorry. M, O and P?

MR. KARWOWSKI: N, as in Nancy.

THE COURT: N.

MR. KARWOWSKI: O and P.

THE COURT: Okay. Thank you.

MR. KARWOWSKI: In fact, Exhibit P says there may be contamination. It doesn't even say there is contamination, number one. Number two, if you look for the word Mian in that document it's nowhere. Next, most importantly, Your Honor, some of these exhibits cited by the debtors, they actually show that Mian's property was not a source of contamination. These are Exhibits N, as in Nancy, O, Q and R. Let's look at some of these exhibits. And before we begin, Your Honor, I would note there's a map in Exhibit Q. This will help us understand what some of these documents say. In Exhibit Q we're looking at Document 4724. And looking at this map, Your Honor, we see

that Mian's property is all the way to the right, to the east. And where are the wells that were put on Mian property? MW9, MW11. Knowing that Mian's property is to the east, let's look at Exhibit N, as in Nancy, Page 8.

THE COURT: I'm sorry. Page what?

MR. KARWOWSKI: Page 8, on top, also it says on the bottom, 17643. This is an environmental report from 1990. What does it say near the bottom? Conclusions and recommendations. This is in debtors' own exhibit, Your Honor. It says prevailing groundwater flow direction is toward the southeast. Not coming from the east, which is Mian's property. It's going to Mian's property. So, if Mian were actually looking at a document like this, this is what he would have found. Next, Exhibit O, Page 4, on the bottom it says 18612.

THE COURT: Okay.

MR. KARWOWSKI: The first full paragraph, the second sentence. TCE concentrations detected in these four monitoring wells indicate a suspected off-site source of TCE contamination exists to the northwest, not to the east, which is, again, Mian's property. Exists to the northwest. Next, Exhibit Q. Looking at Page 5, also on the bottom designated by the number 4685. First full sentence.

THE COURT: Go ahead.

MR. KARWOWSKI: The plume appears to originate in the vicinity of the MW4 monitoring well, and extends offsite to the

east on the neighboring property near MW11. So, again, it's saying where? The contamination originates on Litco's (phonetic) property, extends to the east, spreading to the east, Mian's property. These are actually the documents, Your Honor, that the debtors are saying should have told Mian, well, you have a claim. In fact, these documents say Mian, you don't have a claim. And finally, Your Honor, Exhibit R. This is designated by the number 4786. In the first paragraph we see the sentence beginning, "Available groundwater." "Available groundwater data suggests that a source may be present in the area between Monitor Well 4, 5 and 3C." Those are on Litco's property. Again, what are the wells on Mian's? Nine and 11.

So, what is the result of this, Your Honor? Debtors' own exhibits show that in the '90's if Mian had researched this -- he had no reason to, because no one had ever told him that he had a claim. But even if he did, he would have noticed that these documents say, well, you know what, there's no contamination on my property, therefore I have no claim against the buyer -- I'm sorry -- the seller. Additional documents that were omitted from debtors' papers support this. I'll hurry up, Your Honor. That's Exhibits A and B to the reply. If we look very quickly at Exhibit A to the reply, the second page, this is a DEP report from 1995. We're looking at Paragraph 5, the fifth sentence, referring to the expression, or the part of the sentence, "groundwater contamination does

not originate from offsite sources," offsite sources meaning potentially Mian's property.

Next, Your Honor, Exhibit B, if we look at Document 3784.

THE COURT: 3784?

MR. KARWOWSKI: 3784.

THE COURT: All right.

MR. KARWOWSKI: Mian's property is the property where it says grass, existing building. Those are wells. You'll notice the absence of any numbers underneath those circles, whereas if we look to the left of that the Litco property, see under the circles?

THE COURT: I don't have these exhibits. I haven't seen your reply yet except for the portion of it that is actually the reply itself. I haven't printed all those documents yet.

MR. KARWOWSKI: I merely point this out just for the record, Your Honor, that on the Litco property we see references to numbers. Those signify detections of TCE. Do we see those on the Mian property? There's nothing.

THE COURT: All right.

MR. KARWOWSKI: Moving on, Your Honor. Debtors refer to Exhibit U. It has a reference to large areas of disturbance. What does that mean? It can mean anything? Number one, it could have been road construction, number one.

Number two, it doesn't even specify Mian's property. It just says generally in the area. And as I'll show in a second, any allegation of contamination was disproven anyway. Also, Exhibit S, more general allegations of, quote, staining; therefore, there was a recommendation of testing, that testing occur. But if we look at Exhibits C, D and E, that were attached to the reply, subsequent to tests that were conducted pursuant to their recommendations show that there was no contamination.

Again, Your Honor, that's Exhibits C, D and E. C is a February 16th, '01 letter conducted two months after -- I'm sorry -- sent two months after Exhibit S was sent. We see on Page 4, quote, "based on the soil sampling results these areas are not considered to be potential sources for the contamination identified in Wells 5 and 11." Exhibit D, a November 9, 2001 report, if we see on Page 5, designated by the number 16992, Paragraph 2, second sentence, the plume appears to have originated in the vicinity of the MW5 monitoring well cluster, and extends offsite to the east on the neighboring property. So, it originates on Litco's property, extends to Mian's property.

And we see Exhibit E, this is a January 20, 2006 report. And I'll note, Your Honor, that this was Exhibit Y in the debtors' exhibit book, and this page was actually omitted. And we see again, on the bottom of Page 6, Paragraph 2, the

plume appears to originate in the vicinity of the MW4 monitoring well cluster, extends offsite to the east on the neighboring property. So, insofar as there were allegations that, Mian, there's contamination on your property, testing is then done, and they show that there's no contamination. So, again, Your Honor, cutting through all of this was there any reason for me to be concerned? No, because all he's being told is there's contamination on the site -- on the other property. But even assuming he looks at these documents, Your Honor, they indicate there's no contamination on his property. So, was he aware, in the '90s, that he had a claim? The answer is no.

As to contamination on Mian's own property, and I'll be done in a few minutes, Your Honor.

THE COURT: Please. I think you need to wrap it up. It's gone on a long time.

MR. KARWOWSKI: I will, Your Honor. As to contamination on his own property, the debtors appear to rely upon Exhibits U and Q. I've already dealt with U. I've already dealt with Q, as well. And I would note that Q was actually issued post-petition, so he would not have known as of the filing date even if you looked at that thing, Exhibit Q. But as we went over before, Exhibit Q actually says that Mian is not liable.

And then, finally, Your Honor, in terms of the remaining exhibits, W, X, Y, those are also post-petition. And

in fact, if we look at Exhibit X, it refers to resolving environmental matters on the adjacent property. Again, no reference to contamination on his own property. This is as late as 2005, where someone is expressing a concern about contamination on Litco's property, but nothing about contamination in Mian's property.

The remaining arguments, Your Honor, there's the preemption argument. We deal with that in our papers. I would also note, Your Honor, that it's not even relevant to what we're doing here because I would submit that that's a matter for the District Court. That's a substantive allegation regarding a claim. We're dealing with the automatic stay. Assuming there's a preemption let the District Court handle it. The same with the injunctive relief, Your Honor. If, in fact, Judge Thompson finds that there is an ongoing hazard that needs to be dealt with, then we can always defer until later on whether or not there's a hazard to be corrected today.

A few more points, Your Honor. Arguments regarding relief from stay, they argue they did not arrange for disposal. In fact, we cite -- we offer the proposition that all you need to do is move some dirt around. That qualifies as disposal. And we say, you know what, you built a 17,000 square foot building. Presumably in doing that you had to check if the ground would support this building. So, we would submit that that constitutes disposal of a hazardous substance under

CERCLA. But again, Your Honor, it's a factual issue for the District Court anyway. Let them deal with whether or not there's -- whether Mian actually asserts a CERCLA claim that survives 12(b)(6). All Your Honor is dealing with is automatic stay.

The same with the innocent or interim owner defense. We argue that that defense doesn't apply. But again, even assuming it does, let the District Court deal with it. It's a substantive matter dealing with CERCLA. Let the District Court deal with it.

And finally, they make the allegation regarding the inapplicability of the Landfill Act, but I think we deal with that in our papers, so -- that's all for now. Thank you, Your Honor.

THE COURT: Ms. Baer?

MS. BAER: Your Honor, I'll try to be brief, as frankly you made a lot of the arguments I would have made in terms of issues. So, let's go back to the beginning again, Your Honor. What Mian wants to do here is pursue a third party complaint against Grace to collect a pre-petition debt, and that's simply what they're doing here, Your Honor, and when you boil it all down, we sold the property in 1987. We had nothing more to do with the property. If there are environmental issues on the property, Mian, starting in at least 1987 when they purchased the property, had a legal relationship with

Grace. That legal relationship arises under CERCLA, and that legal relationship arises under the contract between the parties. In at least 1985, when the first well was put on Mian's property, Mian was on notice that there could be issues. Mian was on notice that the neighbor was looking for source of environmental contamination. And over the next number of years --

THE COURT: Wait. I'm sorry. 1985 the first well put on Mian's property?

MS. BAER: 1995.

THE COURT: Oh.

MS. BAER: I'm sorry, Your Honor. I may have misspoke.

THE COURT: Okay.

MS. BAER: In 1995 the first well was put on Mian's property. A subsequent well was put on in 1997. Wells were put on later, after that. We don't know what Mian knew or didn't know. What we know is that Mian owned the property, that a number of wells were put on the property, that the neighbor was doing clean up, was doing subsequent investigation. We know that. The New Jersey Department of Environmental Protection had the reports results. Mian could have asked for them at any time the wells were being put on its property, and Mian could have known, and we know from some of the documents that we have looked at, is that there were issues

being investigated. They were looking not just for the source, Your Honor, but they were also looking for whether or not there was the presence of environmental contamination. Just because the environmental reports were showing that the source may have been Litco's property doesn't mean that they weren't looking for and ultimately finding presence of TCE on Mian's property. In fact, Your Honor, if you look at Exhibit U, that's exactly what it does. There is a listing now and it looks at Monitoring Wells 9 and 11, and sees -- in fact is seeing in the groundwater, deep in the groundwater some potential TCE presence -- not necessarily the source, but the presence, and that's one of the things that we're looking for.

Your Honor, this is a contingent claim. This is a classic contingent claim. That's what the Bankruptcy Code says. If we leave out the word contingent claim, that makes no sense. And on thing that Mian did not do here today is they never mentioned the Reading case. The Reading case is a lead case in the Third Circuit. The Reading case is subsequent to Frenville, and the Reading case says when you have a CERCLA claim you look at the legal relationship, the legal relationship test that started with Schweitzer. Schweitzer and Reading were pre-CERCLA cases, therefore they couldn't, in those cases, find that in fact CERCLA was the legal relationship that would then create this contingent claim. But here, Your Honor, we have two legal relationships. We have

CERCLA, and under CERCLA Grace is, in fact, a former owner, and therefore Grace is involved in CERCLA to the extent that they could be a potentially responsible party. That's one legal relationship. The second legal relationship, Your Honor, is the contractual one. Grace, Baker & Taylor, contracted with a Mian entity. The entities have changed, but they are essentially Mian entities. And that created another legal relationship. And since at least 1995, if not sooner, Mian knew that it may have a claim against Grace. That, Your Honor, under the Reading analysis, and under the Schweitzer analysis, constitutes a contingent claim. Your Honor, in talking about Frenville, a couple of things were not mentioned. There's the footnote, which Your Honor pointed out. But even before you get to the footnote, there's a very significant discussion where it talks about the legal relationship, and it talks about when a cause of action accrues, and it said that a right to payment arises absent overriding federal law by reference to state law. Here, Your Honor, we have overriding federal law. We have CERCLA. And that's where we get to the contingent claim we have.

I'd like to read from Judge Randy Haines, who is a well regarded Bankruptcy Judge, and I think does one of the nicest jobs of talking about Frenville and trying to make this distinction. He says, I quote, "The accrual of a cause of action under state law does not determine when a claim arises

under the Bankruptcy Code. That is because the Code defines claim to include contingent and unmatured claims which may not yet constitute a cause of action under state law. The failure to understand this important distinction between a claim and a cause of action is what gives rise to the famous misunderstanding in Frenville." Your Honor, if we did not read it this way, if we read Frenville the other way, we would weed out the possibility of contingent claims. Here, Your Honor, we have a contingent claim. We have a contingent claim, and it's one that Mian has possessed pre-petition. There's no doubt whatsoever, no doubt whatsoever, Your Honor, here that we have a pre-petition claim and the automatic stay applies. That's all you're being asked to decide today, and I think it's very simple to decide.

Your Honor, I want to clear up a couple of other things that were said by Mian's counsel. Number one, the issue of Grace's knowledge. In 1986, when Baker & Taylor decided to sell this property it did what a prudent landowner does. It investigated to see whether or not there were problems, any environmental issues, because it saw that its next door neighbor was, in fact, doing some clean up.

Your Honor, what its next door neighbor was doing, and this was well published in the New Jersey newspapers at the time, is they were cleaning up a spill of some environmental contamination in drums that had been mishandled on the

property. That was a mishandling that took place in the ‘80s. Grace investigated. Grace looked at what was happening. It talked to the New Jersey Department of Environmental Protection. And as you can see from the documents which were discussed today, it concluded that that clean up of those drums was underway, in fact, was close to completion, and it had not implicated its own property. It looked at its own landscaping records, which are attached as part of the same exhibit that was pointed out by Mian’s counsel. It looked at the various records and concluded that its own property was okay.

Your Honor, things changed, but not because really of that contamination. What’s going on now, Your Honor, as we understand it from reviewing these documents, is there is another contamination issue, not the spillage of the drums, but the clean up of the spillage of the drums apparently prompted Litco to look further.

There is apparently another source, or another contamination problem which is a groundwater contamination problem, and that’s this investigation that’s been going on. That’s what these groundwater -- these monitoring wells have been doing. They’ve been investigating to check and see whether or not there is other contamination deep within the groundwater.

Your Honor, when Baker & Taylor built a two-story building with no basement in the early ‘80's, and constructed

that building, it could not have known and could not have discovered from that building, and could not have moved around anything that was contaminated. The contamination we're talking about here is deep in the groundwater. In fact, Your Honor, and as Mian has pointed this out, if you look at the soil, you look at the soil samples that they attach today, the soil was not the problem. The soil was clean. When Baker & Taylor built this building it was moving around clean soil. That's not the environmental issue for which Litco is seeking to collect from Mian.

Your Honor, one other point we need to make, and that has to do with the way in which contribution protection works under CERCLA. Here what Mian is doing is it's trying to assert a CERCLA 113 action. Your Honor, if Mian was arguing that the stay should be lifted, we would have of course argued that they don't have any justification to do so, and one of the things is because we don't believe they ultimately have a CERCLA claim against Grace. CERCLA 113 actions are derivative.

Litco is not pursuing Grace. Litco is the one that has the contamination. Litco is the one who is looking to see whether or not some of this contamination seeped onto Mian's property or was the source of the problem on Litco's property. Litco hasn't filed a claim against Grace, therefore Mian actually would not be able to succeed here with respect to this claim being asserted by Litco.

But again, Your Honor, you're not being asked today to decide whether or not the stay should be lifted. If you were, Your Honor, we believe that you would conclude the stay should not be lifted. Mian is trying to involve Grace in complicated, convoluted environmental litigation, and litigation under CERCLA where Grace is not the owner, Grace did not create the disposal, Grace did not arrange for the disposal, Grace had nothing to do with it and no knowledge of it. That will ultimately fail, Your Honor. That CERCLA claim will fail.

But right now, today, you're being asked to decide is this a pre-petition claim that should be stayed, and, Your Honor, based on what Mian knew, based on the timing with respect to what's happening here, there can be no doubt that a legal relationship under the Reading and the Schweitzer test existed. This was a legal relationship created, number one, by federal statute, which is outside of the Frenville analysis, the CERCLA statute, and number two, by the contractual relationship between the parties. Under this legal relationship they have a contingent claim under Section 101. They are seeking to collect this contingent claim. They are seeking to collect a pre-petition claim, which, of course, is stayed by the automatic stay. And there's no exception, Your Honor. They are not a governmental entity. They are not seeking to enforce a police power right. This is not a Tourico

(phonetic) situation. Even if they were seeking to enjoin us and order us to do clean up, this does not give them a police power right, therefore they're still not exempt from the automatic stay, Your Honor.

Under these circumstances we think it's quite clear this is a pre-petition claim, the automatic stay applies, and Mian's motion must be denied.

THE COURT: Two minutes.

MR. KARWOWSKI: All right. Just a couple things, Your Honor. One is with respect to the allegation of Mian being on notice of the issues, he may have a claim -- that's not the standard. The issue is was he aware? Even assuming we applied their test, was there awareness of knowledge that you possessed a claim? Based on the documents I went through, there's nothing in there that would suggest, oh, I now have an environmental claim.

THE COURT: Well, the question is are you on reasonable inquiry notice? And when someone is drilling wells on your property because they are trying to ascertain whether there is groundwater contamination, you're on inquiry notice, and if that happened in 1995, six years before this case was filed, it's a pre-petition claim.

MR. KARWOWSKI: But, Your Honor --

THE COURT: There's just no way around it.

MR. KARWOWSKI: But -- Your Honor, you said yourself

that this happens all the time now.

THE COURT: It does.

MR. KARWOWSKI: So, does that mean all those people have --

THE COURT: What I said happens all the time --

MR. KARWOWSKI: Does that mean --

THE COURT: -- what I said happens all the time is that people are concerned about environmental issues to the point where if there is an obvious issue they will inquire. That's what you were asking about, and I want to make sure that my comment is taken in that regard, not that people are drilling wells looking for groundwater contamination. You've presented this in the perspective of soil contamination, not groundwater contamination. This is groundwater contamination. People don't know about groundwater contamination, typically speaking, but when somebody drills a well on your property looking for groundwater contamination, you're on notice if there is groundwater on your property and somebody is drilling a well trying to figure out whether the water is contaminated, you're on notice to try to figure out whether your water is contaminated.

MR. KARWOWSKI: Okay. But what does a person do, then? Do they just file a complaint the next day? Or do they wait for the results?

THE COURT: Well --

MR. KARWOWSKI: He waited for the results. The results come back, they say --

THE COURT: What a person does is inquire. And the New Jersey Department of Environmental Protection has reports. And to the extent that your client is on inquiry notice, you have a duty to inquire when Grace files a bankruptcy case in 2001, and then sends out a bar date notice, you have a duty to file, if nothing else, a notice that your client may have a claim. It's then up to the debtor to decide whether or not the debtor is going to object to it. But all of that happened here except for the fact that your client didn't file the claim. So --

MR. KARWOWSKI: But, Your Honor, all the documents -- if you were to look at the documents, they would have told you, as we went through them, they said the contamination is on Litco's property, not on Mian's.

THE COURT: That's actually not what the documents said that you pointed out.

MR. KARWOWSKI: They do say that. Many of the documents say originates on Litco's, extends to the east.

THE COURT: Well, that's the point. Extends to the east means that one --

MR. KARWOWSKI: I mean, going -- going towards.

THE COURT: -- it doesn't mean it's starting on your property, but it's extending to that property.

MR. KARWOWSKI: Your Honor, that is what it says. And that --

THE COURT: Pardon me. We can't talk over each other. The court reporter can't get it. So, you go first, and then I'll try to get from you the information I'm trying to get from you.

MR. KARWOWSKI: I apologize, Your Honor. But some of those documents say that, yes, but some of the documents we went through said, yes, there's no contamination offsite.

THE COURT: Exactly. There's no contamination on site. Some of the documents also say that there's no contamination, period, so there's no claim, period.

MR. KARWOWSKI: So, wouldn't that support Mian, then, if he's being told I don't have a claim?

THE COURT: Of course. It also supports Grace. There's no claim. If there's no contamination, there's no claim. There's no CERCLA issue at all --

MR. KARWOWSKI: But he's being sued now. And we're --

THE COURT: Then he'll have a defense. If there's no claim, if there's no contamination --

MR. KARWOWSKI: Exactly.

THE COURT: -- he'll have a defense.

MR. KARWOWSKI: You're exactly right, Your Honor.

THE COURT: Okay.

MR. KARWOWSKI: And that happens in the District Court.

THE COURT: Fine. But you're not going to drag Grace into it. This is clearly a pre-petition claim. I wholly agree with Ms. Baer's argument, every word of it, and I adopt it as my analysis. This is a pre-petition claim. The automatic stay applies. Your request for a declaration that the automatic stay does not apply has to be denied. It is simply the wrong analysis in this context. Frenville does not stand for the proposition that you're asking me to extend Frenville in this particular context, it just does not stand for that proposition.

MR. KARWOWSKI: Your Honor, even assuming we don't apply Frenville, we apply their tests, there has to be awareness, knowledge.

THE COURT: No, there does not. There has to be an obligation on behalf of your client to inquire. There's got to be some basis for ascertaining that a claim may exist. In this instance there were wells drilled on the property back in 1995, 1997, and other times pre-petition, before the bankruptcy was filed. To that extent there is reasonable inquiry notice that should satisfy that test that puts your client on notice that there may be a basis for contamination. Your client is now asserting at this point in time that Grace may have somehow or other caused that contamination. If Grace did cause that

contamination you have a claim against Grace that should be reconcilable in this bankruptcy case. To the extent that the clean up has already occurred, then that's a monetary damage issue. To the extent that the clean up has not yet occurred and you're seeking somehow injunctive relief, I -- at this point that is an issue that can abide whatever the District Court determines is appropriate relief if the District Court determines that there is appropriate relief. That claim surely can then be converted into a money damage claim, because somebody will have to do the work, you'll know what the cost is, and as to the debtor, which hasn't been involved in that property since 1987, that can be a money damage claim. The problem your client is going to have to face is no claim has been filed. But that's a different issue for a different day.

MR. KARWOWSKI: Your Honor, you mentioned inquiry notice. No one came back to him and said, oh, by the way, those are results, produce something. And if he had gone to look at the documents they would have indicated nothing.

THE COURT: I've already addressed -- I've addressed that. I don't know how else more to say it. There are wells being drilled on the property for groundwater contamination. That is a pretty big inquiry notice that somebody is concerned about contamination on the property. Groundwater isn't static. It flows.

MR. KARWOWSKI: So, even though the wells are coming

back saying negative he should still file a claim?

THE COURT: Your client should do whatever your client deems appropriate. The fact that your client didn't file a claim may mean that your client didn't think he -- may mean your client thought he didn't have a claim. I don't know what's in your client's mind.

MR. KARWOWSKI: Your Honor, he had no idea about this until '06, so -- that's when he was sued. So, actually '07. So -- and everything -- all the facts that we have all indicated that he did not have a problem, he did not have a claim.

THE COURT: If he had no claim then he doesn't file a claim. In this context he's on inquiry notice to ascertain in 1995 whether there was a claim. If there was a claim then at that point in time when Grace files its bankruptcy, he's got an obligation when the bar date notice goes out to take action to file a claim. If it's a contingent claim, or an unliquidated claim, or an unfixed claim for whatever reason, then he files it in that capacity, and when the claim becomes known, becomes fixed, becomes liquidated, then those elements become known and the claim gets amended.

MR. KARWOWSKI: But, Your Honor, nothing --

THE COURT: That's how the bankruptcy system works.

MR. KARWOWSKI: I understand, Your Honor. But nothing would tell him that he had even a contingent claim.

Everything was saying there's no contamination. So, Your Honor, I would ask that --

THE COURT: Your own -- the documents that you've just given me from your point of view, you're arguing at odds with your own analysis. You know, you can't have your cake and eat it, too. Either the documents do support that there's contamination that started offsite and moved to the east, or they don't. If they don't, then there is no claim.

MR. KARWOWSKI: But, Your Honor, that's for the District Court.

THE COURT: If they do --

MR. KARWOWSKI: That's for the District Court. And, in fact -- I guess we don't know today because --

THE COURT: No.

MR. KARWOWSKI: -- there's a complaint.

THE COURT: The issue for me is whether or not there was sufficient notice, pre-petition, that this claim arose so that it is pre-petition, then the automatic stay applies. For the reasons I've already articulated, and I'm not debating this with you, I've already made my ruling, I find that it is a pre-petition claim. The automatic stay does apply. And your motion to have a declaration that the automatic stay does not apply is denied. That's the end of this story.

I'll take an order, Ms. Baer, from you after you circulate it to counsel, that will deny the motion.

MS. BAER: Thank you, Your Honor. I'll do so.

MR. KARWOWSKI: Thank you, Your Honor.

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C E R T I F I C A T I O N

I, TAMMY DeRISI, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Tammy DeRisi Date: September 9, 2008

TAMMY DeRISI

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